MAR 25 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1956

No. 856

COLUMBIA PICTURES CORPORATION,

Petitioner,

against

RICHARD STEPHENS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARTHUR H. SCHWARTZ,
Counsel for Petitioner.

LAWRENCE C. GIBBS,
STUART G. SCHWARTZ,
of Counsel.

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This is a petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit (Clark, Ch.J., Frank and Lumbard, C.JJ.), entered February 5, 1957, affirming a judgment of the United States District Court for the Southern District of New York, entered April 5, 1956, after a trial before Murphy, D. J. and a jury, awarding respondent the sum of $12,500 as compensatory damages in an action for defamation (34, 114)*.

Opinion Below

The opinion of the Court below is not yet reported. It is reproduced *infra*, at pages 21-24.

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* Unless otherwise indicated, references are to pages of appellant's appendix in the Court of Appeals.

Jurisdiction

The judgment of the Court of Appeals was entered on February 5, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

The Questions Presented

1. In an action for defamation, where jurisdiction is based solely upon diversity of citizenship and where the allegedly libelous statement is in substance a charge that the plaintiff has committed larceny, may a Court of Appeals disregard State criminal law in determining whether the defense of truth has been established?

2. In an action for defamation, where jurisdiction is based solely upon diversity of citizenship and where the allegedly libelous statement is in substance a charge that the plaintiff has committed larceny, is a Court of Appeals, in passing upon whether the defense of truth has been established, entitled to disregard decisions of the State courts holding the definition of criminal intent as set forth in the State penal law to be controlling?

The Statutes Involved

28 U. S. C. Section 1652:

> "The laws of the several states except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

New York Penal Law, Section 1290:

> "A person who, with the intent to deprive or defraud another of the use and benefit of property or to

appropriate the same to the use of the taker, or of any other person other than the true owner, wrongfully takes, obtains or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, thing in action, evidence of debt or contract, or articles of value of any kind, steals such property and is guilty of larceny * * *."

New York Penal Law, Section 1306:

"Upon an indictment of larceny it is a sufficient defense that the property was appropriated openly and avowedly, under a claim of title preferred in good faith, even though such claim is untenable. But this section shall not excuse the retention of the property of another, to offset or pay demands held against him."

Statement of the Case

This is an action for defamation instituted by respondent, a citizen of Massachusetts (3), against petitioner, a New York corporation (3). Federal jurisdiction is predicated upon 28 U. S. C., Section 1332(a)(1).

Respondent is a former employee of petitioner, his employment having been terminated on May 14, 1952 (7, 52-53). The allegedly defamatory matter consists of statements made by petitioner in the autumn of that year in connection with the filing of claims with the fidelity insurance company by which respondent had been bonded while in petitioner's employ. Three defamatory statements are alleged to have been made, two of them in two formal "Proofs of Loss" filed by petitioner with the insurance company (4-6, 8-10, 29-34), and the third in a preliminary letter sent by petitioner to the insurance broker who had

arranged for the insurance (13). Each of the allegedly defamatory statements is embodied in a separate cause of action.*

Each of the proofs of loss consists of a schedule of moneys with respect to which respondent was claimed to be in "default", followed by a printed form of affidavit. The schedule in the first proof of loss reads as follows (29):

> "COLUMBIA PICTURES CORPORATION presents claim for loss resulting from default under Bond No. 894555 dated 8/7/50 in the amount of $..... on behalf of Richard Stephens employed in the position of Exploiteer at Boston exchange.
>
> DETAILED STATEMENT OF CLAIM

Description of Item	Amount
Automobiles Livery Service, Inc.—Roxbury, Mass.	$ 25.00
Sheraton Plaza Hotel, Boston, Mass.	122.73
Fay Foto Service, Inc., Boston, Mass.	95.50
Waterville Morning Sentinel, Waterville, Maine	4.59
	$247.82

> In the belief that Richard Stephens had paid the above, we reimbursed him when so requested by him at the time weekly expense vouchers were submitted. After his dismissal, bills were sent to us by the above and upon investigation we learned that Richard Stephens never did make payment."

The printed form of affidavit reads as follows (30-31):

> "STATE OF NEW YORK }
> COUNTY OF NEW YORK } ss.:
>
> On this .... day of ..... 19..., before me a ..... in and for the State and

* Three additional causes of action were dismissed on respondent's consent at the close of the trial (14-20, 92-93).

County aforesaid, personally appeared .....
....., to me known, who, being duly sworn according to law, deposes and says that he is ..... of ..... (Employer) and that the above statement is true and correct in every respect and that the moneys set opposite the several items listed therein were collected by the said Employee on the dates and in the respective amounts set opposite each, and that the proceeds of same, together with the proceeds of the goods as set forth in said statement, have not been paid over or satisfied in any way whatever to the said Employer, but have been misappropriated by the said Employee with the intent to fraudulently deprive the said Employer of the same.

That where in this affidavit claim is made for Merchandise (as distinguished from cash) alleged to have been misappropriated by said Employee, said Merchandise is herein listed at the cost price of same to the Employer, i.e., exclusive of profits, etc.

That said Employee's default was discovered by Employer on or about August 1952.

Further, that there are no offsets whatever against said claim for salary, commissions, cash or other deposits except as set forth particularly on the above statement; that the said Employer has fully complied with all the conditions of the bond, issued by MARYLAND CASUALTY COMPANY of Baltimore, on behalf of the said Employee and that the said Employer has not accepted any security for or on account of same, except .....

Further, that the Employer holds *no other bond or policy of any kind covering this loss or any part thereof,* except .....

Further, the deponent saith, that the said Employee has been continuously in the employ of the said Employer for the period beginning 9/6/49 and

ending 5/15/52, the employment having been discontinued by reason of dissatisfaction.

L. J. BARBANO

Subscribed and sworn to before me, the undersigned at New York City, this 23rd day of October, 1952.

SHIRLEY WILEY,
Notary Public,
(Stamp illegible)".

The schedule in the second proof of loss reads as follows (32):

"COLUMBIA PICTURES CORPORATION presents claim for loss resulting from default under Bond No. 894555 dated ..... in the amount of $..... on behalf of Richard Stephens employed in the position of Exploiteer at Boston, Mass.

DETAILED STATEMENT OF CLAIM

Description of Item	Amount
Telephone calls during the period of March 15, 1952 through April 9, 1952 .	$43.44".

The printed form of affidavit in the second proof of loss is identical to that in the first, except as to dates and the name of the notary (33-34).

The pertinent portion of the letter to petitioner's insurance broker written in September of 1952 reads as follows (13):

"We had in our employ for about two years an exploiteer named Richard Stephens. We became dissatisfied with his work and were obliged to let him go. After we made final payment to him for his salary as well as expenses incurred while in our employ, we subsequently were informed of unpaid

bills for which we had reimbursed Richard Stephens * * *."

With respect to each of the causes of action, the following interpretation is pleaded in the complaint by way of innuendo for each of the respective allegedly defamatory statements (6, 10-11, 13):

> "That by the aforesaid publication, the defendant meant and intended to mean and it was understood by the persons to whom the said false libel was published that the plaintiff had feloniously embezzled, stolen, misappropriated and defalcated with the moneys, funds and property of the defendant * * *; that the plaintiff had committed and is guilty of the crime of stealing, embezzlement and larceny; that the plaintiff was guilty of wilful and criminal defaults; and that the plaintiff was an employee who was guilty of misconduct in his occupation, employment and profession, and that he was an irresponsible and unreliable employee and person."

In its answer petitioner pleaded two affirmative defenses, truth and privilege (22-27). In support of the defense of truth, petitioner alleged that moneys had been paid by it to respondent for certain bills set forth in expense vouchers submitted by him, and that respondent had misappropriated those moneys (22-26). In support of the defense of privilege, petitioner alleged that it was under a duty to advise the insurance company of respondent's defalcations (26-27), and that the proofs of loss and the preliminary letter were written in good faith and without malice (27).

At the trial, respondent admitted that moneys had been given to him by petitioner for bills set forth in expense vouchers submitted by him (44-47; App'ee's App. 23)* and

* References identified as "App'ee's App." are to pages of appellee's appendix in the Court of Appeals.

that he had retained the money instead of paying the bills set forth in the vouchers (44-47; App'ee's App. 13, 20-21, 38-39). He explained that some items in the voucher—for sums which he had personally expended—had been disallowed by petitioner (App'ee's App. 13-14), that he had hoped to induce petitioner to reconsider those items (App'ee's App. 16, 20-21), and that, instead of paying the approved bills set forth in the vouchers, he had "held up" the money given him for the approved expenses to await the disposition of his request for additional funds to cover his personal claim (47; App'ee's App. 39). He testified that he was still urging petitioner to reconsider its disallowance of his personal claim when he learned that the proofs of loss had been filed with the insurance company (App'ee's App. 43-44).

Under New York law, the merit or lack of merit of respondent's personal claim was immaterial insofar as the illegality of his conduct in withholding the money was concerned. By virtue of the last sentence of Section 1306 of the Penal Law (set forth *supra* at p. 3), one who misappropriates or withholds money or property is guilty of embezzlement—treated as a form of larceny by the New York Penal Law (§ 1290)—whether or not he has a good claim of offset. In this respect, the law of New York (and that of several other states having similar statutes) differs from the law of the majority of American jurisdictions (see 13 A. L. R. 142, 144).*

The District Court recognized the illegality of respondent's conduct and instructed the jury "as a matter of law" that respondent had no right to misappropriate the moneys given him on the voucher by using them as an offset against his personal claim (109). However, notwithstanding the fact that respondent's conduct constituted a crime on the

* The fact that respondent's personal claim had been stricken from the voucher precluded any claim of "title" under the first sentence of section 1306.

undisputed facts, the Court nevertheless instructed the jury that there still remained for them the issue of whether his intent had been "fraudulent", and that on that issue they could consider the testimony concerning the claimed offset (109). Petitioner's motions for a directed verdict and to set aside the verdict ultimately rendered were denied (93, 114).

On appeal, petitioner pointed out that, contrary to the District Court's ruling, the claimed offset had no bearing on whether respondent's intent was criminal. For purposes of the New York penal statute, it was sufficient to constitute criminal intent that he had intended to withhold money given to him for the purpose of paying approved expenses. Accordingly, petitioner argued that a verdict should have been directed in its favor, and that the District Court erred in submitting the case to the jury.

In affirming the judgment below, the Court of Appeals did not quarrel with the accuracy of petitioner's contentions as to the provisions of the New York Penal Law. The Court simply held the penal law to be inapposite, apparently on the theory that "fraudulent" intent for purposes of fidelity insurance is something different from "criminal" intent as defined in the Penal Law. The Court stated (*infra*, p. 23):

> "In the proofs of loss before us, on which the first two causes of action are based, Columbia charged Stephens with misappropriation 'with intent to defraud.' Regardless of whether this be considered equivalent to a charge of embezzlement or larceny, justification of the statement must include proof of an 'intent to defraud.' The existence of such intent was a question for the jury, and the provisions of § 1306 of the New York Penal Law are not controlling."

With respect to the letter constituting the basis of the third cause of action, the Court likewise relied upon respondent's contention that he had an "unpaid claim" and that "final payment had not in fact been made" (*infra*, p. 24). Refusing to take cognizance of the fact that this was immaterial under the Penal Law, the Court stated (*infra*, p. 23):

> "The jury found that it did libel Stephens, but it cannot be inferred from that finding that they found the letter contained an accusation of larceny. The most that can be said is that the letter implied a defalcation on Stephens' part. Section 1306 of the New York Penal Law pressed on us by counsel, is therefore inapposite here also."

In short, the Court of Appeals held that it was not enough for petitioner to prove that respondent had in fact been guilty of criminally embezzling the moneys in question. The Court held, in effect, that even assuming that respondent was proved to be guilty of the crime imputed by the allegedly defamatory statements, nevertheless the defense of truth would not be regarded as having been established unless petitioner also proved additional facts which had no bearing upon the criminality of respondent's conduct under State law.

Reasons for Granting the Writ

Review is sought pursuant to the second clause of Rule 19(1)(b) of the Rules of this Court, in which it is provided that issuance of a writ of certiorari to a Court of Appeals may be deemed appropriate under the following circumstances:

> "Where a court of appeals * * * has decided an important state or territorial question in a way in conflict with applicable state or territorial law."

In the present case, insofar as it holds that there is a difference between "fraudulent" intent for purposes of fidelity insurance and "criminal" intent for purposes of the Penal Law, the decision of the Court of Appeals is in conflict with the law of New York as expressed in the following State Court decisions:

Graves v. *Kaltenbach & Stephens, Inc.* (1st Dept. 1923) 205 App. Div. 110, aff'd on other grounds 237 N. Y. 546;

Greene v. *Fankhauser* (1st Dept. 1910) 137 App. Div. 124;

J. W. Matthews & Co. v. *Employers' Liability Assurance Co.* (2d Dept. 1908) 127 App. Div. 195, aff'd 195 N. Y. 593;

Burlingame v. *Sun Printing & Publishing Assoc.* (2d Dept. 1936) 247 App. Div. 894.

The question is important because it affects the interpretation of thousands of fidelity insurance policies which are currently in effect in New York. The proof of loss filed in the present case is the standard form used by all insurance companies which are members of the Surety Association of America, which include virtually all stock companies engaged in the business. In 1955, the total premiums collected on fidelity and surety policies in New York State aggregated more than $26,000,000,* which constituted more than a third of all such premiums collected in the United States.**

Up to the present time, it has always been assumed that the existence of the fraudulent intent referred to in these policies is sufficiently established by proving criminal intent as defined in the Penal Law. The holding of the Court of Appeals in the present case upsets this firmly established principle and seriously impairs the scope of the protection afforded by such policies.

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* N. Y. Ins. Dept. Advance Printing of Principal Statistics, Bus. of 1955, pp. 7 AS, 7 NS.

** Best's 1956 Aggregates and Averages, pp. 132, 196.

Argument

The State Court decisions set forth above establish the following propositions: (1) *Graves* v. *Kaltenbach & Stephens, Inc., supra,* 205 App. Div. 110, aff'd on other grounds 237 N. Y. 546, and *Greene* v. *Fankhauser, supra,* 137 App. Div. 124, establish that respondent's admitted intent was criminal as a matter of law under the New York larceny statute; (2) *J. W. Matthews & Co.* v. *Employers' Liability Assurance Co., supra,* 127 App. Div. 195, aff'd 195 N. Y. 593, and *Burlingame* v. *Sun Printing & Publishing Assoc., supra,* 247 App. Div. 894, establish that the words "fraudulent intent" as used in fidelity policies are to be interpreted in accordance with the meaning of criminal intent under the larceny statute.

POINT I

Respondent's intent was criminal as a matter of law.

Graves v. *Kaltenbach & Stephens, Inc., supra,* 205 App. Div. 110, aff'd on other grounds 237 N. Y. 546, was an action for wrongful discharge in which the justification pleaded by the defendant for the discharge was that plaintiff had committed larceny by applying to his own use money entrusted to him to be paid over to a third party. The plaintiff testified that he had an offsetting claim for disbursements. The case was submitted to the jury on the issue, *inter alia,* of plaintiff's criminal intent. Holding that a verdict should have been directed for the defendant, the Court stated (at p. 111):

> "It was admitted, not alone by failure to reply to the counterclaim but specifically upon the trial, that he had never paid this money over but had retained and converted it to his own use. His only

> justification was that as he had the money in his possession when he was discharged he credited the amount on his claims for damages for wrongful discharge and for certain disbursements that he alleged he had made for the defendant's account. Thus the plaintiff admits that he took property of the defendant under such circumstances as amounted to a larceny (Penal Law, § 1290, subd. 2) and for which his alleged justification was not an excuse. (Id. § 1306). This act was a complete justification for the discharge * * *. The facts being admitted, the question of justification was for the court and the case should not have been submitted to the jury."

The difference between a general claim of offset, as referred to in the second sentence of Section 1306, and a specific claim of title, as referred to in the first sentence thereof, was explained in *Greene* v. *Fankhauser, supra,* 137 App. Div. 124, which was an action for false imprisonment in which the defendant had caused the plaintiff's arrest on a charge of larceny. The facts were that the plaintiff was a garage operator who had seized possession of an automobile owned by the defendant and had refused to surrender it unless the defendant paid an outstanding bill. Despite the fact that the plaintiff's motive had been to enforce payment of an outstanding bill, the Court held that he had the requisite criminal intent to support a charge of larceny and was therefore unable to maintain an action for false arrest. The Court pointed out that, while he might have had a general claim against the defendant, he did not have any specific claim of title against the property which he had appropriated, saying (at p. 133):

> "It may well be that if the plaintiff had the lawful possession of the automobile, and erroneously but in good faith asserted ownership or a lien *thereon,* the provisions of this section relieve him of the

> charge of larceny in detaining the property; *but he asserted no lien* • • • " (emphasis supplied).

The Court held that, absent a specific claim of title, the fact that he had intended to deprive another of his property was enough to constitute criminal intent under the New York statute (at p. 132):

> "[W]e are of the opinion that the criminal intent is the intent to deprive the owner of his property in taking it from the street *or in detaining it* in the garage. That is the material fact with respect to the intent that constitutes the crime • • •. Of course, it is well settled that there must be criminal intent in order to constitute a crime, but the criminal intent is the doing of the act prohibited with the intent *specified in the statute.*" (Emphasis supplied.)

In the present case, as in *Graves* and *Greene*, it was clear from respondent's own testimony that he had no claim against the specific funds which he misappropriated. Respondent acknowledged that the moneys entrusted to him had not been allowed on his personal claim, his contention being merely that he conducted discussions with petitioner's representatives as to whether or not petitioner would give him *additional* funds to satisfy that claim (47; App'ee's App. 13-19, 20-21, 38-39). In short, as in the *Graves* and *Greene* cases, respondent's personal claim was at best an offset and, this being so, his intent by his own testimony was criminal within the meaning of the larceny statute, and he was guilty as a matter of State law of the crime defined thereby.

POINT II

Under New York law, the words "fraudulent intent" as used in fidelity insurance policies must be construed in accordance with the meaning of criminal intent as defined in the Penal Law.

As already stated, the impropriety of respondent's conduct was recognized by the District Court when it charged the jury as a matter of law that respondent had no right to misappropriate the moneys that had been entrusted to him by using them to satisfy his personal claim. Nevertheless, the Court of Appeals held that the District Court was justified in submitting the case to the jury on the issue of fraudulent intent, apparently on the theory that fraudulent intent as used in the insurance policy was something different from criminal intent as defined by the Penal Law. This holding of the Court of Appeals was directly contrary to the decision in *J. W. Matthews & Co.* v. *Employers Liability Assurance Co., supra,* 127 App. Div. 195, aff'd 195 N. Y. 593, the third of the State Court decisions cited above, in which it was squarely held that the words "fraudulent intent" as used in fidelity insurance policies are to be interpreted in accordance with the meaning of criminal intent under Section 1306 of the Penal Law.

The *Matthews* case was an action brought by the insured to recover under a fidelity insurance policy which, like the policy in the present case, purported to provide protection against defalcations made with fraudulent intent. In that case, the defalcating employee was a salesman who, before remitting the proceeds of his collections, deducted a portion thereof which he applied against claimed arrears in salary and expenses. Contesting its liability under the policy, the insurance company argued that in view of these claimed offsets the salesman could not be regarded as having been motivated by a "fraudulent intent". The Court, however,

held that the words "fraudulent intent" had to be interpreted in accordance with Section 1306 of the Penal Law, and pointed out that under that section his intent would be regarded as criminal notwithstanding the claimed offsets (at pp. 196-197):

> "Section 548 [predecessor of Penal Law § 1306] provides that it is a sufficient defense that the 'property' was 'appropriated openly and avowedly under a claim of title preferred in good faith, even though such claim is untenable * * *.' The money was not appropriated under a claim of title, but under a claim of indebtedness by the plaintiff to the agent; and it is provided by the last sentence of this same section that the said section 'shall not excuse the retention of the property of another to offset or pay demands held against him'."

It may be noted that an alternative ground for decision in the *Matthews* case was that the factual issue of good faith had been resolved against the salesman. However, the holding with regard to the immateriality of the claim of offset was made entirely independently of that factual issue. Moreover, even in adverting to the factual question of good faith, the Court assumed that the insurance policy would be construed in accordance with the provisions of the Penal Law (at p. 197).

The courts of New York have refused to depart from the foregoing principles in defining the essential elements of the defense of truth in actions for defamation where the gravamen of the defamatory statement complained of is a charge of misappropriation. In *Burlingame* v. *Sun Printing and Publishing Association, supra,* 247 App. Div. 894, where the allegedly defamatory publication had stated that plaintiff's excuse for his defalcations was an offsetting claim for salary, the defendant's plea of truth alleged only that the charge of misappropriation was true and

made no reference to the fact that the pretext had been a claim for salary.

Based upon this failure to make any allegation with respect to his purpose, plaintiff moved to strike the defense for legal insufficiency on the ground that the plea of truth was not as broad as the charge. Refusing to grant such relief, the Court held that, even though the alleged defamatory publication had included a statement concerning plaintiff's purpose, the accusation of misappropriation was the gravamen of the charge, and the purpose was immaterial (at p. 894):

> "We are further of the opinion that, so far as the amended answer alleges that plaintiff took large sums of money from the corporation without legal authorization, it alleges a justification as broad as the charge and constitutes a sufficient defense • • •. The gravamen of the charge is the misappropriation or conversion of corporate funds, and plaintiff's purpose in such misappropriation adds nothing to that charge and is not material thereto. The justification is, therefore, sufficient without alleging the truth of that purpose as stated in the article complained of."

In the present case also, once the fact that plaintiff had committed a crime was established, his purpose was immaterial. If plaintiff was a thief on the admitted facts, there was no material issue for submission to the jury.

The sole State Court decision cited in the opinion of the Court of Appeals in the present case is *Fleckenstein* v. *Friedman* (1934) 266 N. Y. 19. This case merely stands for the axiomatic proposition that proof of the truth of a defamatory statement must generally be as broad as the charge. However, that decision in no way casts any doubt upon the specific rule established by the *Matthews*

case, *supra*, that the words "fraudulent intent" as used in fidelity insurance policies are to be interpreted in accordance with the meaning of criminal intent under the Penal Law. Moreover, the subsequent decision in the *Burlingame* case, *supra*, expressly held that the general rule does not require proof of purpose where the gravamen of the alleged defamatory statement is a charge of misappropriation.

It is significant that the reasoning of the Court of Appeals in the present case is inconsistent with its own recent opinion in *De Ronde* v. *Gaytime Shops, Inc.* (2nd Cir. 1956) 239 F. 2d 735. The *De Ronde* case, also a defamation action, was based upon statements made in a proof of loss identical in form to those involved in the present case. In that case, the misappropriation had taken place in Pennsylvania, where the penal definition of criminal intent is narrower than that in New York in that, unlike New York, the existence of offsetting claims is recognized as a defense to larceny. See *Commonwealth* v. *Wiener* (1941) 340 Pa. 369. In *De Ronde*, adopting an approach entirely inconsistent with the approach taken in the instant case, the Court approved the District Court's submission of the question of "criminal" intent to the jury (at p. 738):

> "The charge contained in the proof of loss embraced the crime of embezzlement, and under the law of Pennsylvania, where the act occurred, embezzlement requires a *criminal* intent. *Commonwealth* v. *Irvine*, 125 Pa. Super. Ct. 606 (1937). The existence or non-existence of such a *criminal* intent was, in this case, a question of fact for the jury." (Emphasis supplied.)

In contrast with the *De Ronde* opinion, the Court of Appeals' holding in the present case, that petitioner was required to prove more than respondent's guilt of the imputed crime, is unprecedented. It is true that Courts

in other jurisdictions have occasionally held that the defense of truth may be established by proof of something *less* than the criminal charge, *i.e.* without proof even of criminal intent. See, *e.g. Buckeye Cotton Oil Co.* v. *Sloane* (6th Cir. 1921) 272 Fed. 615, 623. However, the present decision constitutes the only case in any jurisdiction that the writer has been able to discover in which proof of something *more* than the imputed crime was required in order to establish the defense of truth.

In short, fidelity insurance policies of the type involved in the present case are designed to protect the insured against embezzlement. In the present case, petitioner filed a proof of loss based upon respondent's guilt of that crime. At the trial, petitioner proved that its charges were true and that respondent was, in fact, guilty of the alleged crime. The Court of Appeals, however, relying upon a literal reading of the policy in a fashion contrary to the interpretation decreed by New York State decisional law, held that petitioner was required to prove something more than the commission of the crime.

This holding of the Court of Appeals will have serious consequences upon the vested rights of thousands of employers holding fidelity insurance policies drawn in accordance with the same standard form. If the decision of the Court of Appeals had been rendered by an intermediate State Appellate Court, recourse could have been had to the highest Court of the State, but since it was a Federal tribunal, no such recourse is available. It is respectfully submitted that under Rule 19(1)(b) of the Rules of this Court, this Court is the proper tribunal to correct the clear error of the Court of Appeals, which will otherwise have a serious effect upon the thousands of policy holders of fidelity insurance in the State of New York.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

(Opinion of the Court of Appeals)

Before:

CLARK, *Chief Judge*,
FRANK and LUMBARD, *Circuit Judges.**

LUMBARD, *Circuit Judge*:

Columbia Pictures Corporation, a New York corporation, sued for defamation by Richard Stephens, a Massachusetts citizen, appeals from a judgment against it for $12,500 on the verdict of a jury.

Stephens, an employee of Columbia, working at its Boston, Mass. office, was authorized to make disbursements for Columbia and to put them on a weekly expense account. These expenses were customarily reimbursed to Stephens in a lump sum. Stephens was also authorized to bill certain expenses, charge them to the expense account, and pay the bills out of the expense reimbursement check he received from Columbia.

On May 14, 1952 Stephens either resigned or was discharged by Columbia. At that time, four bills totalling $247.82 which Stephens had incurred for Columbia, remained unpaid. He had received from Columbia the money to pay these bills, but did not pay them; instead he retained the money as an offset against a claim of over $400 against Columbia for other unpaid disbursements he had made.

Columbia subsequently, through its treasurer, Louis J. Barbano, filed with the Maryland Casualty Company, its insurance carrier, two sworn proofs of loss which stated that Stephens had "misappropriated" the funds "with the intent to fraudulently deprive the said Employer of same"; the proofs of loss also recited that "there are no offsets

* Judge Frank died after voting for affirmance but before expressing his views with respect to this opinion. (Footnote by the Court.)

whatever against such claim." Floyd Weber, the defendant's insurance manager, also wrote a letter containing much the same allegations to the insurance brokerage firm which handled Columbia's policy. This action involves three causes of action; one based on this letter and the other two based on the two proofs of loss.

The appellant, Columbia, now contends that the judgment should be reversed on several grounds:

1. That the defense of truth was established, with nothing left for the jury to decide, when plaintiff admitted keeping the money, since plaintiff's good faith, in retaining it as an offset, is irrelevant under New York Penal Law § 1306 which provides:

> "Upon an indictment for larceny it is a sufficient defense that the property was appropriated openly and avowedly, under a claim of title preferred in good faith, even though such claim is untenable. But this section shall not excuse the retention of the property of another, to offset or pay demands held against him."

The defendant relies on the last sentence of this section, arguing that once Stephens had admitted taking the money, his claim of offset should not be considered, criminal intent being implied as a matter of law and no issue being left for the jury.

2. That the defense of qualified privilege was sustained as a matter of law since no actual malice or ill will was shown; nor was Barbano guilty of such reckless disregard of the plaintiff's rights as would amount to malice, since in signing the proofs of loss he acted solely in a ministerial capacity; and

3. That the trial judge erred in admitting evidence over objection, to show ill will towards Stephens on the part of

McWilliams, his immediate supervisor at Columbia, since McWilliams could not be considered as vice-principal in the libel.

We find no merit in any of these contentions. To establish the defense of truth in an action for libel the facts proved in justification must substantiate all of the defamatory matter charged. *Fleckenstein* v. *Friedman*, 266 N. Y. 19, 23 (1934). In the proofs of loss before us, on which the first two causes of action are based, Columbia charged Stephens with misappropriation "with intent to defraud." Regardless of whether this be considered equivalent to a charge of embezzlement or larceny, justification of the statement must include proof of an "intent to defraud." The existence of such intent was a question for the jury, and the provisions of § 1306 of the New York Penal Law are not controlling.

We come now to Columbia's letter to its insurance broker, on which the third cause of action is based. The letter, in part, reads:

> "We had in our employ for about two years an exploiteer named Richard Stephens. We became dissatisfied with his work and were obliged to let him go. After we made final payment to him for his salary as well as expenses incurred while in our employ, we subsequently were informed of unpaid bills for which we had reimbursed Richard Stephens * * *"

Judge Murphy found that the letter was not libelous *per se* and left to the jury the question of whether it held Stephens up to "public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace." The jury found that it did libel Stephens, but it cannot be inferred from that finding that they found the letter contained an accusation of larceny. The most that can be said is that the letter implied a defalcation on Stephens' part. Section 1306 of the New York Penal Law, pressed on us by counsel, is therefore inapposite here also.

Nor was the defense of truth established as to this cause of action either. As noted above, to sustain the defense of truth, New York law requires that the facts proven be as broad as the charge. Here the libelous implication rests at least in part on the allegation contained in the letter that final payment had been made to Stephens " * * * for his salary as well as expenses incurred * * * " There was, however, evidence to support a finding that Stephens had an unpaid claim against Columbia and that final payment had not in fact been made. Whether the defendant had sustained the defense of truth was a question for the jury, and the jury's finding that Columbia had failed in this defense is clearly supported by the evidence.

There is no merit in the appellant's other contentions. Columbia argues that its qualified privilege could be lost only by a showing of actual malice or ill will. Under the law of the State of New York, which governs because the publication took place in New York, the malice which would destroy a qualified privilege is not limited to personal ill will. It may also consist of a wanton and reckless disregard of the rights of another. Cf. *Murray De Ronde* v. *Gaytime Shops,* — F. 2d — (2 Cir. decided December 7, 1956) and the cases cited therein. The jury's finding of such recklessness is here supported by the evidence. It may be true that both Barbano and Weber were acting in only a ministerial capacity, but in so doing they relied on information obtained from McWilliams, plaintiff's immediate superior. These officers knew of McWilliams' marked personal animosity to Stephens and despite that they accepted McWilliams' statements without investigation. This evidence was sufficient to sustain a finding of reckless disregard of the plaintiff's rights. Of course evidence of McWilliams' animus against Stephens and the fact that it was known to Barbano and Weber were pertinent and clearly admissible.

Affirmed.

(Judgment of Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of February one thousand nine hundred and fifty-seven.

Present:

HON. CHARLES E. CLARK,
Chief Judge,
HON. JEROME N. FRANK,
HON. J. EDWARD LUMBARD,
Circuit Judges.

RICHARD STEPHENS,
Plaintiff-Appellee,

v.

COLUMBIA PICTURES CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO,
Clerk.

APR 2 2 1957

JOHN T. FEY, Cl

Supreme Court of the United States

OCTOBER TERM, 1956

No. 856

COLUMBIA PICTURES CORPORATION,
Petitioner,

against

RICHARD STEPHENS,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SCHENKER & SCHENKER,
Attorneys for Respondent.

DAVID SCHENKER,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1956

No. 856

COLUMBIA PICTURES CORPORATION,
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against

RICHARD STEPHENS,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief is submitted in opposition to the petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit (Clark, Ch. J., Frank and Lumbard, C. J. J.), entered February 5, 1957, unanimously affirming a judgment of the United States District Court for the Southern District of New York, entered April 5, 1956, after a trial before Murphy, D. J. and a jury awarding respondent the sum of $12,500 as compensatory damages in an action for libel upon a charge to the jury to which not a single exception was taken or request to charge was made by either appellant or respondent (ff. 34, 114, 339-42).*

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* Unless otherwise indicated "f" refers to folios in appellant's appendix and "R" to appellee's appendix; and Italics have been supplied.

Opinion Below

The opinion of the Court of Appeals is reported at 240 F. 2d 764 and set forth in appellant's petition (pp. 21-24). Appellant made no motion to the Court of Appeals for reargument or for a stay of its mandate.

Jurisdiction

The judgment of the Court of Appeals was entered on February 5, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

The Questions Presented

(1) Is any question presented for review where in an action for libel, with jurisdiction based solely upon diversity of citizenship, the trial court following the law of the State of New York, where the libel was published, in its charge to the jury stated that to establish the defense of truth the facts proved in justification must substantiate all of the defamatory matter charged and left to the jury as issues of fact specifically whether respondent "misappropriated" the funds of defendant or had any "intent to frauduently deprive" appellant of such funds as charged in the libel, to which court's charge no exception was taken?

(2) Assuming appellant's position that the libelous matter charged respondent with the crime of larceny under the Penal Law of the State of New York did not appellant to sustain the plea of truth have the burden of proving felonious or larcenous intent on part of respondent to "misappropriate with the fraudulent intent to deprive" appellant of its funds as charged in the libel and was not the existence of any such intent a question of fact for the jury?

(3) Did not the trial court, as affirmed by the Court of Appeals, follow precisely the law of the State of New

York where it charged the jury that the proof of justification must be co-extensive with the libel; that to be so co-extensive defendant had to prove "misappropriation with intent to fraudulently deprive" appellant of its funds as charged in the libel and that such "misappropriation" and "intent to fraudulently deprive" were issues of fact for the jury?

(4) Were not the issues presented pure questions of fact to be determined by the jury?

The Statutes Involved

The statutes (28 U. S. C. 1652, New York Penal Law, Sections 1290, 1306) claimed by appellant to be involved are set forth in its petition (pp. 2, 3).

Statement of the Case

This is an action for libel with Federal jurisdiction based solely on diversity of citizenship under 28 U. S. C., Section 1332(a).

Two causes of action are each based upon sworn proof of loss filed by defendant with a surety company charging that specified moneys *"have been misappropriated"* by *plaintiff*, employed by defendant, *"with the intent to fraudulently deprive the said employer of the same"*; and the third, upon a letter of intent to file such proofs. Defendant's answer admits publication but pleads truth and conditional privilege (ff. 36-41, 61-80, 88-99).

The trial took about two weeks with about 1,500 pages of testimony and 200 exhibits. Not a single exception was taken to the trial court's charge nor any requests for further charges made by either party. The jury, on a stipulation authorizing one verdict, found for plaintiff. Judge Murphy denied from the bench defendant's motions to set aside the verdict and to dismiss the complaint (ff. 339-342). The Court of Appeals unanimously affirmed (240 F. 2d 764).

Brief Outline of Case

Plaintiff, an employee of defendant, upon his final accounting on his running expense account when he quit defendant's employ admittedly repeatedly asserted, prior to final payment to him, various claims against defendant for expenses and moneys due him resulting in a dispute as to the final amount due to plaintiff. Plaintiff and defendant then had an understanding that he would hold up payment of certain bills in prior expense vouchers pending the final disposition of his claims. Without apprising plaintiff of such disposition as it had promised, defendant falsely and fraudulently and with actual malice, filed without any notice to plaintiff, proofs of loss with a surety company charging him with "misappropriation with intent to fraudulently deprive" defendant of its funds, and representing to the surety company that he had asserted no claims whatsoever against defendant.

Based upon documentary proof and the sworn admissions by six of defendant's principal executives called by plaintiff as his own witnesses and upon the court's charge, to which no exception was taken, which specifically left to the jury as issues of fact the truth of the libel that plaintiff "misappropriated" funds "with fraudulent intent to deprive" defendant of such funds and defendant's actual malice in publishing the libel, and after defendant had its complete day in court with a trial lasting about two weeks, the jury found the libelous charge was false and published with actual malice.

Facts

On September 6, 1949, plaintiff who had previously worked for eight years at Warner Bros. Pictures Corporation where he had established a reputation for good character, personality and ability, was hired as a publicity man or "exploiteer" for defendant by Nathan Spingold, a vice-president of defendant, without the knowledge of any executives who were to supervise plaintiff and

assigned to Harry K. McWilliams ("McWilliams"), manager of the exploitation division. These supervisory employees, directly involved in the publication of the libels, resented this hiring over their heads and from the inception manifested an animus against plaintiff evidenced by a continuous campaign to have him fired for no reason except antipathy (S. M. 1-9, R. 3, 57, 94-95).

McWilliams assigned plaintiff to defendant's Boston office headed by Harry Rogovin ("Rogovin"). McWilliams admitted that he constantly complained to the other officers about plaintiff, particularly whenever he took instructions from Rogovin; Stephens protested these criticisms as unjustified; and McWilliams unsuccessfully tried repeatedly to have Stephens fired. The situation became so critical that Rogovin knowing the facts wrote to McWilliams and his superiors that Stephens had blamelessly acted on his instructions. McWilliams' harassments culminated on January 9, 1952 when he fired Stephens on the pretended ground of insubordination when the real reason was that Stephens had admittedly complained bitterly to McWilliams about his incompetency and antagonism (Ex. 103, R. 94, 117, S. M. 1217).

Stephens then convinced McWilliams' superiors, Howard LeSieur ("LeSieur") and Paul N. Lazarus ("Lazarus") that these complaints were merely a cover-up for McWilliams' own inefficiency, but this discharge was not rescinded for these superiors were not then prepared to re-arrange the exploitation office (Exs. 12, 13, R. 3-6). However, Rogovin, knowing this discharge was unjustified, interceded with Montague, one of defendant's top officers, and Lazarus yielding to Montague's request that he "reconsider", reinstated Stephens. The resentment of McWilliams, Lazarus and the other executives against Stephens was aggravated by his going over their heads to get his job back. McWilliams who directly participated in the preparation of the documents containing the libelous matter admitted his "unfriendly feelings" against Stephens (R. 51-52, 98).

Defendant in the proofs of loss swore not only that plaintiff had "misappropriated" funds "with intent to fraudulently deprive" defendant of such funds but "that there are no offsets whatsoever against said claim" (ff. 90, 99). The record is indisputable that plaintiff had not "misappropriated" any funds and had no "intent to fraudulently deprive" defendant of funds. On the contrary the record is clear that plaintiff had asserted prior to the filing of the proofs various *bona fide* claims and had a dispute with defendant on his final accounting and was, pursuant to an understanding with defendant merely holding up further payment of bills pending a disposition of his claims; and defendant, without any notice to plaintiff of such disposition, filed the charge of "misappropriation with fraudulent intent to deprive" with the surety company.

After his reinstatement, plaintiff was instructed by McWilliams to handle the personal appearance tour of two actresses with plaintiff to use his own automobile to transport them, their luggage and exploitation material. McWilliams wrote Stephens: "we have taken care of all insurance matters in connection with the ladies riding in your car." During this tour, youngsters attracted by these movie stars ruined plaintiff's car top. LeSieur admitted that Stephens informed him that the tour was "rough on him" and "his car". Although LeSieur agreed that defendant would pay for a new car top, plaintiff was never reimbursed for this item which was one of the claims asserted by him on his final accounting (Exs. 6, 7, 22, R. 7-10, 74).

A few weeks later, plaintiff while in New York en route to St. Louis pursuant to McWilliams' instructions, complained to Montague that this precipitous assignment was a continuation of McWilliams and Lazarus' campaign to compel him to resign, particularly since Columbia had other exploiteers in St. Louis, and that rather than be a party to such an act, he preferred to resign. Lazarus,

after being informed by Montague that he too did not see the necessity for sending plaintiff to St. Louis, accepted Stephens' resignation which took the form of a "voluntary discharge" on May 14, 1952 (R. 10-12, 52).

It is clear and in fact not disputed that plaintiff, at the time he quit defendant and repeatedly thereafter, asserted both orally and in writing, claims against defendant aggregating $465. Plaintiff on the day he quit submitted his last expense voucher. Clifton O. Slenker, defendant's business manager, deleted from this voucher items totaling $53.15 and admitted Stephens then objected to this deletion (Ex. 30, R. 108, 14, 71-2). On May 18, 1952, four days after leaving Columbia and prior to the filing of the proofs of loss, plaintiff admitted and wrote to Slenker:

> "* * * therefore I am requesting payments for the following: $250.00 vacation pay; 53.15 monies in full expenses submitted thru 5/14; 96.00 for new car top which was ruined on Barbara Hale tour; 67.50 half months rent which was paid to Copley Plaza Hotel; $466.65 Balance due me. * * *" (Ex. 32)

Slenker did not produce this letter, testifying that all his records as business manager were destroyed a few weeks after plaintiff quit.

On May 18, 1952, Stephens admittedly also wrote to Montague asserting a claim against defendant. Lazarus was forced to admit that he knew plaintiff had asserted all these claims when he left the company. LeSieur admitted that plaintiff asserted all of these claims at the time of quitting; he continued to discuss these claims with plaintiff during June, July, August 1952 prior to the filing of the proofs of loss; and he had been informed by plaintiff that he was holding up further payment of bills. McWilliams who helped prepare the proofs admitted he knew of each of these claims. Weber, defendant's insurance man, who physically prepared the proofs had to

admit that Slenker had told him before plaintiff left Columbia's employ of a claim for damage to his car (Ex. 31, R. 49-50, 68-75, 88, 108).

Defendant knew that plaintiff asserted these claims; that a *bona fide* dispute existed as to the final accounting; that plaintiff was holding up payment of bills pending final accounting and defendant promised to dispose of these claims. Yet, defendant without admittedly ever informing plaintiff that his claims were rejected or the proofs were to be filed charged plaintiff with "misappropriation with fraudulent intent to deprive" and averred that plaintiff had been "paid in full" and "had not asserted any claims" (R. 16, 39-42, 76, f. 144). McWilliams and LeSieur admitted that never before had there been any question as to plaintiff's honesty or as to even a single item on his vouchers (R. 72, 100).

Stephens in his job continuously expended his own funds or incurred bills usually on his credit with "vendors" for innumerable items and then submitted weekly expense vouchers, receiving reimbursement about two weeks later, so that Columbia was always indebted to him on his running account with all funds commingled and used to pay indiscriminately the current and past obligations to vendors including the exploiteer when he was a "vendor". The funds received on vouchers were not and could not be "ear-marked" so as to apply specific funds to specific bills (R. 18-21, 34-40).

Defendant charged in its proof of loss specific bills totalling $291.26 as having been fraudulently misappropriated by plaintiff. The facts as to these items also clearly negative any "misappropriation" or "intent to fraudulently deprive" and clearly establish that defendant knowingly included items for which plaintiff never received funds. Defendant included an item of $4.59 for the Waterville Sentinel Journal. Shortly before quitting Columbia, plaintiff received from defendant about $5,000 on vouchers including this Waterville bill. Plaintiff, as

defendant knew, paid prior to and after quitting its employ all the vouchers except this $4.59 (Ex. 36, R. 19). The jury refused to believe plaintiff had misappropriated this $4.59 with intent to fraudulently deprive the defendant of these funds. As to the Copley Plaza and Fay Foto bills aggregating $218.83, about two weeks after leaving defendant, plaintiff received a check in that amount from defendant. One would assume from the proofs of loss that plaintiff then pocketed this money and absconded. The fact is, however, immediately upon receipt plaintiff personally paid the funds of this check plus $13.51 to Columbia as "vendor" which payment was known to defendant prior to filing its proofs (R. 17, 39-41, Ex. 35). The item of Automobile Livery Service, Inc. of $25 was included although plaintiff had incurred and paid this bill six months before he quit and defendant admittedly never checked with him. Telephone bills aggregating $43.44 were included as funds actually paid to plaintiff. Defendant's answer admitted the falsity of this charge by alleging that part of this item was never paid to plaintiff but was an alleged debt for personal telephone calls (ff. 71-75).

In answering a surety company inquiry whether Columbia contacted plaintiff and his reply on the unpaid bills, defendant suppressed the facts of plaintiff's assertion of his claims and of the understanding to hold up payment and falsely stated: "Stephens was confronted with the unpaid bills but since he was annoyed because of his dismissal he has so far paid no attention to us" (R. 60-4, Exs. 53, 54, R. 114.5). Plaintiff was never "confronted" nor was he annoyed over his "dismissal" because he, in fact, had resigned.

In addition, when requested by the surety company for plaintiff's last known address, defendant fraudulently concealed this address and claimed it did not know plaintiff's whereabouts. The invariable practice of the surety company is to strive to locate an employee so he could

offer his defenses before an *ex parte* determination that he was guilty of wrongdoing. Ofttimes the alleged fraudulent misappropriation may, as in the case at bar, merely be a justified withholding of payment because of offsets and the claim, therefore, not covered by the fidelity bond. The proof of loss, therefore, requires the sworn statement that no claims whatsoever have been asserted by the employee against the employer.

The surety asked Columbia for "the last known address of the principal so that the company might endeavor to contact him." Defendant's reply it did not know plaintiff's last address was patently false since plaintiff gave his address of 237 Independence Drive, Boston to LeSieur who promised to write him about his claims (Ex. 83, 86, R. 45, 114, S. M. 559-60). LeSieur and McWilliams unequivocally swore they first heard the address "237 Independence Drive" was when Stephens testified in the courtroom. LeSieur was compelled to admit that he had written "237 Independence Drive" on a memo dated August 13, 1952 (prior to the filing of the proofs); and he gave that memo to McWilliams (Ex. 82, R. 75-6, 93, 99, 117). This memo established that defendant had promised but failed to write to plaintiff on the disposition of the claims and concealed this fact from the surety company. McWilliams testified his records in the exploitation office, just like Slenker's in the business office, had been destroyed soon after plaintiff quit Columbia (R. 92-3).

ARGUMENT

I

The libel charges plaintiff "misappropriated" funds "with the intent to fraudulently deprive" defendant of such funds. Proof of the plea of truth must be as broad as the specific charge made. Defendant had to establish the "misappropriation" and the "intent to fraudulently deprive" which were the vital elements of the libel.

The complaint alleges and defendant's answer admits that it filed two proofs of loss containing the sworn statement:

> "that the moneys * * * have been misappropriated by the said Employee with the intent to fraudulently deprive the said Employer of same."
>
> * * * * *
>
> "Further, that there are no offsets whatever against said claim for salary, commissions, cash or other deposits except as set forth particularly on the above statement" (ff. 85-94, 95-100).

The gravamen of the libel is clear and simple—"misappropriation" of funds "with the intent to fraudulently deprive" defendant of such funds. The position of the trial court, sustained by the Court of Appeals, was that the libel having charged "misappropriation" and "intent to fraudulently deprive", defendant must prove these elements under a defense of truth and the issue of fact as to the truth of these elements were questions of fact for the jury.

That a defendant who destroys the reputation of another and seeks to avoid liability on the ground of truth has the burden of establishing with exactitude every element of the precise charge made was recently reiterated in *Crane* v. *New York World-Telegram,* 308 N. Y. 470 (1955) where defendants published of plaintiff: "John

Crane, former president of the UFA now under indictment, * * *." The court, discussing facts pleaded in justification as a complete defense, stated:

> "A plea of truth as justification must be as broad as the alleged libel and must establish the truth of the precise charge therein made. See, e.g., White *v.* Barry, 288 N. Y. 37, 39; Fleckenstein *v.* Friedman, 266 N. Y. 19, 23; see, also, Seelman on The Law of Libel and Slander (1933), §171, p. 146. It is one thing to say that a person has been accused by his colleagues and, without waiving immunity, has testified before a grand jury to criminal activities, and quite another thing to say that an indictment has been brought against him by a grand jury. See Jones, Varnum & Co. *v.* Townsend's Administratrix, supra, 21 Fla. 431, 440. The former charge may be a serious blot upon reputation, but the latter says, in a practical and a moral sense, much more, for it announces that an actual criminal prosecution has been brought against him; that he must stand trial and may be found guilty and sentenced to a prison term."

The court held even the partial defense insufficient (p. 477):

> "But, of necessity, the facts that go to make up a partial defense in mitigation and reduction must *tend to prove the truth of the precise charge* made by the publication. See, e.g., Gressman *v.* Morning Journal Ass'n, supra, 197 N. Y. 474; Lanpher *v.* Clark, supra, 149 N. Y. 472.
>
> "In the case before us, however, the facts alleged are entirely unrelated to the truth of the charge that plaintiff had been indicted; they tend at most to prove that plaintiff had engaged in criminal activity and had been accused of wrong-doing by his fellow firemen."

The court approved *Levey* v. *New York Evening Journal,* 237 App. Div. 255, holding that the defense that plaintiff was being *"investigated by the Attorney-General"* was insufficient as a partial defense to a libel charging plaintiff had committed a crime and had been *"arrested by the district attorney's office."*

The charge of the trial court in the case at bar requiring defendant to prove truth of the charge of the "misappropriation" and the "intent to fraudulently deprive" defendant of funds and that such truth was an issue of fact for the jury and its approval by the Court of Appeals in the instant case was precisely correct and in complete accord with the laws of the State of New York and of all other jurisdictions. The trial court following the *Crane* case, *supra*, and *Fleckenstein* v. *Friedman*, 266 N. Y. 19 (cited in the *Crane* case, *supra*) charged the jury to which no exception was taken:

> "Now, a plea of truth as justification for a libelous statement must be as broad as the libel and must establish the truth of the precise charge therein made. There is a trite but accurate saying among lawyers that truth is a perfect defense, but it must be the whole truth, not partly true or almost true. * * * If the statement is true, it is a complete defense, no matter what reason or emotion prompted it."

The trial court then discussing the elements of "misappropriation" and "fraudulent intent" charged the jury to which no exception was taken:

> "So your first issue of fact in connection with the defenses is: Were the statements in the proof of loss true? Now, words charged to be defamatory are to be taken in their natural meaning and construed as persons generally understand them and according to their ordinary meaning. Webster defines 'misappropriate' as follows: To appropriate wrongly or misapply in use, especially wrongfully and for one's self. 'Fraudulently' is defined as: Using fraud; trickery; deceitful. 'Intent' is defined as 'an intending or purpose; also that which is intended or purposed; the intent and meaning of the devisor, hence design, purpose.'"
>
> * * * * *
>
> "If you find that the statements made in the proofs of loss and in the letter, if you find the letter to be libelous, were in fact true, that is the end of the case and your verdict must be for the defendant."

The trial court in its charge then discussed without any exception in detail the evidence as to plaintiff's "fraudulent intent" informing the jury to consider plaintiff's non-payment of the bills, his discussions and understanding about his claims and holding up payment, the period of time that had elapsed, and "all acts and circumstances from which you can draw an inference as to his intention" and based upon the overwhelming evidence the jury found that plaintiff had not misappropriated any funds and had no intent to fraudulently deprive defendant of its funds.

II

It is basic law of New York and every common law jurisdiction that in civil actions as well as criminal actions, to establish a charge of "misappropriation with fraudulent intent", larceny or other criminal or wrongful conduct, such fraudulent, larcenous, criminal or other wrongful intent must not only be proven but is a question of fact for the jury and not a presumption or inference of law.

There is absolutely no merit to defendant's petition for certiorari. Defendant does not even remotely claim that there are any constitutional questions, conflict of decisions of Courts of Appeals of various circuits or federal questions involved. The only issue presented was a pure question of fact as to the truth of defendant's libel that plaintiff misappropriated funds with a fraudulent intent. It is not contended that the court committed error in its charge that the defense of truth must be co-extensive with the libel. No exception to the charge was taken and, therefore, no question as to the correctness of the legal principles expounded in the charge was raised at the trial. Defendant is futilely attempting to raise an issue of law where none exists.

Appellant urges that the libelous statement that plaintiff "misappropriated" funds with the intent to fraudu-

lently deprive defendant of such funds constituted a specific charge of larceny under Penal Law, Section 1290:

> "A person who, with the intent to deprive or defraud another of the use and benefit of property or to appropriate the same to the use of the taker, * * *, wrongfully takes, obtains or withholds, by any means whatever, from the possession of the true owner * * * any money, * * *, or article of value of any kind, steals such property and is guilty of larceny."

It is manifest that to establish a crime or larceny under that section the specific intent prescribed therein—the intent to deprive or defraud another of his property—must be established. The intent imputed to plaintiff in the instant libel was similar to the intent established to prove larceny—the intent to fraudulently deprive. This question of this intent was specifically left to the jury which not only found such intent did not exist and but that plaintiff had no larcenous, criminal, fraudulent or other wrongful intent. Yet, defendant argues in direct conflict with the specific language of the Penal Law, Section 1290, and the universal and invariable holdings of the decisions of the State of New York and of every other common law jurisdiction that proof of such intent is not required; and if required, such intent is not a question of fact for the jury.

Defendant asserts that, even though plaintiff had no felonious intent or intent to fraudulently deprive and merely held up payment of the bills pursuant to an understanding pending the disposition on a final accounting of his *bona fide* claims, plaintiff was guilty of larceny by reason of the last sentence of Penal Law, Section 1306.

These contentions that a charge of larceny can be established without proof of criminal intent or that Penal Law, Section 1306 eliminates from Penal Law, Section 1290 the specific requirement of a criminal intent has invariably been rejected.

The latest pronouncement is the comprehensive opinion in *Morissette* v. *United States*, 342 U. S. 246 (1952), which analyzed and discussed in detail the decisions and statutes of all common jurisdictions, particularly federal and New York, including Penal Law, Sections 1290 and 1306, and completely rejects appellant's position the court held unequivocally that the *sine qua non* of larceny-type offenses is criminal intent and the existence of criminal intent is a question of fact for the jury.

Defendant Morissette who took some spent bomb casings rusting away in a heap on a United States air force bombing range was convicted for a violation of 18 U. S. C., Section 641 providing: "whoever embezzles, steals, purloins, or knowingly converts" government property is punishable by fine and imprisonment. The trial court would not permit defendant to show "this man thought it was abandoned" or to submit to the jury whether he acted with innocent intention and charged: "The question on intent is whether or not he intended to take the property. He says he did. Therefore if you believe either side, he is guilty." Counsel contended, "But the taking must have been with a felonious intent" but the court ruled: "That is presumed by his own act."

This learned court stated (pp. 250, *et seq.*):

> "The contention that any injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. • • • Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will'"
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> • • • • •
>
> "Stealing, larceny, and its variants and equivalents, were among the earliest offenses known to law that

existed before legislation; * * *, when a sufficient amount is involved, the infamy is that of a felony, which, says Maitland, is '* * * as bad a word as you can give to man or thing.' State courts of last resort, on whom fall the heaviest burden of interpreting criminal law in this country, have consistently retained the requirement of intent in larceny-type offenses. If any state has deviated, the exception has neither been called to our attention nor disclosed by our research."

"Nor do exhaustive studies of state court cases disclose any well-considered decisions applying the doctrine of crime without intent to such enacted common-law offenses, although a few deviations are notable as illustrative of the danger inherent in the Government's contentions here."

The court, discussing the necessity of proving a criminal intent even as to the offense "knowingly to convert" stated (pp. 263, 270):

"* * * Congress, by the language of this section, has been at pains to incriminate only 'knowing' conversions. * * * Had the statute applied to conversions without qualification, it would have made crimes of all unwitting, inadvertent and unintended conversions. * * * Probably every stealing is a conversion, but certainly not every knowing conversion is a stealing. 'To steal means to *take away from one* in lawful possession without right *with the intention to* keep wrongfully.' (Italics added.) *Irving Trust Co.* v. *Leff*, 253 N. Y. 359, 364."

Similarly, *People* v. *Brofman*, 247 App. Div. 987 (1st Dept., 1948)[1] reversed a conviction of grant larceny under Penal Law, Section 1290, and completely repudiates appellant's position that Penal Law, Section 1306 eliminates the necessity for proving criminal intent or that such intent is an inference of law and not a question of fact for the jury. Brofman, a fur salesman, sold a fur coat and received but did not turn over to his employer

1. The facts are not set out in detail in the opinion and the recital herein is taken from the record on appeal.

the proceeds, claiming that he told the employer he was holding up the money until after an accounting on his claimed commissions. The trial court after stating defendant admitted he did not turn over the money but was holding it until commissions due him were determined stated: "I charge you as a matter of law, if you believe the defendant did that he committed the crime of grand larceny in the first degree." The court refused the quest of defendant's counsel to charge:

> "That a felonious intent to deprive or defraud another of his property, for his own use is a necessary element of the crime of larceny and that unless the jury found in this case that at the time defendant refused to turn over the $625 for the coat he was acting with such felonious intent, they may find him not guilty."

The *People's* brief in the *Brofman* case relying upon the same arguments, decisions and Section 1306 of the Penal Law, precisely similar to those of Columbia's in the case at bar urged:

> "The evidence adduced by the People established that defendant sold a fur coat for his employer and converted the $625 proceeds to his own use. Defendant, far from disputing the prosecution's case, specifically confirmed it when he testified that he used the $625 for his 'own purposes'. The explanation he offered—that he appropriated the money as an offset against unpaid commissions—was not only insufficient in law."

The *People's* brief cited Section 1306, Penal Law, and the identical cases quoted and relied upon exclusively by appellant to establish its contention that Section 1306 eliminated the necessity for proving felonious or fraudulent intent in larceny cases in the State of New York which cases will be disscussed in detail hereafter.

Brofman contended on appeal:

> "To sustain a larceny charge a 'felonious intent', an 'intent to steal' must be established and is an issue of fact for the jury; that Penal Law, §1306 did not elim-

inate the necessity of proving felonious intent in larceny, merely because the taking may have been done to offset a claim by the take against the owner; all the circumstances surrounding the refusal to turn over the funds must be considered by the jury in determining whether there is a felonious intent; and the last sentence of Penal Law, §1306 must be read together with Penal Law, §1290 which defines larceny as 'a person who, with intent to deprive or defraud another etc.,' thereby making felonious intent a necessary element in any larceny."

Some of the decisions relied on by *Brofman* to sustain these contentions of necessity to prove criminal intent are set forth.

McCourt v. *People,* 64 N. Y. 583, 586:

"'• • • Every taking by one person of the personal property of another, without his consent, is not a larceny; and this, although it was taken without right, or claim of right, and for the purpose of appropriating it to the use of the taker. Superadded to this, there must have been a felonious intent, for without it there was no crime. • • •."

People ex rel. Perkins v. *Moss,* 187 N. Y. 410, 420:

"'• • • The charge of stealing property is only substantiated by establishing the felonious intent. Without it there is no crime; for it would be a bare trespass. It is the criminal mind and purpose going with the act, which distinguishes the criminal trespass from a mere civil injury."

People v. *Levan,* 295 N. Y. 26, 33, 34:

"'• • • The gist of larceny is the taking and carrying away of personal property of another *with the specific intent to steal* such property (Penal Law, Sec. 1290).'" (Emphasis by court.)

People v. *Koerber,* 244 N. Y. 147; *People* v. *Will,* 289 N. Y. 413, and *People* v. *Flack,* 125 N. Y. 324, holding there can be no larceny without intent to steal which is an issue for the jury.

Eatman v. *The State,* 48 Fla. 21, where a refusal to charge if defendant honestly believed he had the right to use funds, collected for his employer, he would not be guilty of embezzlement, was reversible error:

"* * * The refused charges are upon the theory that if the defendant in good faith believed he had a right to use collections made by him and did in such good faith and without secrecy or concealment use them, however mistaken or frivolous or ill founded his claim of right might in fact be, if he honestly entertained such a belief he would not be guilty."

People v. *Eastman,* 77 Cal. Rep. 171, where a conviction of larceny of a mare pledged by defendant for a debt was reversed because trial court refused to allow him to prove pledgee owed him wages:

"* * * For if the defendant had taken the mare off under the honest belief that he had a right to do it, in view of the fact that he might, in good faith, have considered his unpaid claim for wages to have been sufficient to have reimbursed McClure for the amount due him on the pledge, the jury would have been warranted in believing that the intention to steal was absent. * * *"

People v. *Klinger,* 165 Misc. 634, 636:

"* * * Whether the claimed setoff is an honest one, made under a firm belief of rightful title, even though a mistaken notion of the law, presents a question of fact."

The court in the *Brofman* case, 247 App. Div. 987, *supra,* repelled the *People's* contention, similar to Columbia's, and reversed the conviction, held that Penal Law, Section 1306, did not eliminate necessity for establishing felonious intent and that such intent was an issue for the jury, stating:

"Although the trial court left the question of felonious intent to the jury, the effect of the charge as given was to advise the jury that criminal intent had been established as a matter of law. This was error requiring

reversal and a new trial in this case. McKenna *v.* People, 81 N. Y. 360. As was said in People *v.* Flack, 125 N. Y. 324, 334, 11 L.R.A. 807:

'However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury. * * *' "

The court further indicated that claims asserted in good faith might be a defense under Penal Law, §1306:

"The point is made in the appellant's brief that he would be entitled to an acquittal if the jury found that he mistakenly, but in good faith, believed that he had a right to hold the $625 in question until paid the commissions allegedly owing by his employer. See Penal Law, §1306.

It is a sufficient answer to this contention that no request for a charge to this effect was made on the trial. For reasons which we deem adequate we find it unnecessary to discuss the question further at this time."

The criminal intent or "intent to fraudulently deprive" is an indispensable element which must be found to exist by the jury in civil actions, particularly on fidelity bonds based upon charge of fraudulent intent or larceny. The leading case is *World Exchange Bank* v. *Commercial Casualty Ins. Co.*, 255 N. Y. 1 (1930), where plaintiff sued by reason of the acts of its bank teller on a bond indemnifying against "any loss through any dishonest or criminal acts." The court stating "embezzlement or larceny" is a "term or art" held:

"*Criminal the act was not, unless done with criminal intent.* People *v.* Flack, 125 N. Y. 324, 11 L.R.A. 807; People *v.* Wiman, 148 N. Y. 29." (Court's Italics.)

See *Van Schaick, Superintendent, etc.* v. *Fidelity & Casualty Co.*, 152 Misc. 449, action on fidelity bond where court followed *World Exchange* case.

Commercial Banking Corp. v. *Indemnity Insurance Co.*, 1 F.R.D. 380, action by employer on a fidelity bond where

the court, relying upon the *World Exchange* case, held surety company to establish absence of larcenous, dishonest or other wrongful intent in withholding funds collected may plead that agent had asserted claims in excess of such funds.

Appellant's contention that plaintiff's intent was criminal as a matter of law is repugnant to the fundamental laws of New York and of every common law jurisdiction and is in conflict with the very authorities cited by appellant. In the *Morissette* case, *supra,* which treats in detail with the New York cases and Penal Law, Sections 1290 and 1306, this learned Court discussing the ruling of the trial court that defendant's felonious intent was "presumed by his own act" of taking the property stated at (pp. 275-276):

> "Moreover, the conclusion supplied by presumption in this instance was one of intent to steal the casings, and it was based on the mere fact that defendant took them. The court thought the only question was, 'Did he intend to take the property.' That the removal of them was a conscious and intentional act was admitted. But that isolated fact is not an adequate basis on which the jury should find the criminal intent to steal or knowingly convert, that is, *wrongfully* to deprive another of possession of property. Whether that intent existed, the jury must determine, not only from the act of taking, but from that together with the defendant's testimony and all the surrounding circumstances."

The cases and arguments particularly those based upon Sections 1290 and 1306 of the Penal Law, relied upon by appellant, as has been indicated, were specifically relied upon by the *People* in the *Brofman* case, *supra,* where the court completely repudiated the position that Section 1306 eliminates the necessity for establishing a fraudulent or criminal intent and specifically held that this intent be established and is a question of fact for the jury.

In *J. W. Matthews & Co.* v. *Employers' Liability Assur. Corp., Ltd.,* 127 App. Div. 195, the trier of the facts, the

referee, specifically found as a fact that the employee had a felonious intent:

> *"the plaintiff did not owe the employee the amount he so retained, but only $95.05, and that his claim that it was owing to him was not made in good faith, but with intent to avoid payment to the plaintiff of certain sums he owed it."*

In the case at bar, the trier of the facts, the jury found that plaintiff had no felonious intent, no intent to fraudulently deprive, no intent to misappropriate; his claims were asserted in good faith and not with the intent to avoid payment; a *bona fide* dispute existed between the parties on the final accounting; and payment was being held up pursuant to an understanding betwen the parties.

The *Graves* v. *Kaltenbach & Stephens, Inc.*, 205 App. Div. 110, was an action for wrongful discharge where the defenses were "hiring at will" and "justification for the discharge." In essence, the Appellate Division merely held that a failure to turn over funds was justification for discharging an employee even though he asserted *bona fide* claims, since no felonious intent is required and a technical conversion would suffice. *In addition, most vitally, Columbia omits to state that the Court of Appeals specifically refused to affirm on the ground that the discharge was justified.* The court, after stating that the answer pleads that plaintiff had received moneys from defendant in a fiduciary capacity, namely, for payment to other of defendant's employees but which plaintiff instead retained and appropriated, held:

> "Per Curiam. Judgment affirmed, with costs on the ground that the contract of hiring was one at will.
>
> Hiscock, C. J., and Hogan, Cardozo, Pound, Crane, and Andrews, JJ., concur.
>
> McLaughlin, J., votes to affirm, also, on ground that discharge was proper."

In *Greene* v. *Frankhauser*, 137 App. Div. 124, where a new trial was granted because the charge on the question of intent was ambiguous, the court specifically stated:

"Of course, it is well settled that there must be a criminal intent in order to constitute a crime, but the criminal intent is the doing of the act prohibited with the intent specified in the statute."

* * * * *

"It may well be that if the plaintiff had the lawful possession of the automobile, and erroneously, but in good faith, asserted ownership or a lien thereon, the provisions of this section would relieve him of the charge of larceny in detailing the property; * * *."

The "intent specified in the statute" was the "intent to fraudulently deprive" a person of his property and in the instant case this specific intent was left by the trial court to the jury and no exception was taken.

In *Burlinghame* v. *Sun Printing & Publishing Ass'n*, 274 App. Div. 894, the court simply held that as a matter of "pleading", a defense of justification that plaintiff took large sums of money from the corporation without "legal authorization" was sufficient to put into issue the legality of the taking and which, of course, would be a question of fact for the jury under proper instructions of the trial court.

Similarly, in 13 A.L.R. 142, relied upon by appellant, the annotation stated p. 142:

"The general rule laid down by the authorities is that one who openly and avowedly takes the property of another without the latter's consent in settlement or as security for a debt bona fide claimed to be due him by the owner of the property is, no matter what the offense may be, at least not guilty of larceny or embezzlement. The basis of the decisions is the lack of intent to defraud, which is the essence of the crime. It is otherwise, however, where there is lack of good faith in asserting a debt, or where there is evidence tending to show a felonious intent in the taking of the property."

In support thereof, the annotation cites *People* v. *Hopkins*, 126 App. Div. 843 (1908) holding that an agent is not guilty of larceny in withholding funds collected for em-

ployer if he, in good faith, retained such funds because of his failure to receive from the employer the moneys claimed to be due.

III

The issue of the truth of the charge of misappropriation with intent to fraudulently deprive was a question of fact for the jury which was correctly presented in a charge precisely in accordance with the laws of the State of New York and to which no exception was taken.

The issue of the existence of the fraudulent, criminal or larcenous intent in a charge of fraudulent misappropriation or of any charge of larcenous act is under the laws of the State of New York and of every other jurisdiction a question of fact peculiarly within the province of the jury. In the *Morissette* case, *supra,* this learned Court stated:

> "State court authorities cited to the effect that intent is relevant in larcenous crimes are equally emphatic and uniform that it is a jury issue. The settled practice and its reasons are well stated by Judge Andrews in *People* v. *Flack*, 125 N. Y. 324, 334:
>
> > 'It is alike the general rule of law and the dictate of natural justice that to constitute guilt there must be not only a wrongful act, but a criminal intention. * * * However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury.'"

Similarly, in a civil action on a fidelity bond indemnifying against "dishonest or criminal acts", the court in *World Exchange* v. *Commercial Insurance Co., supra,* stated: "if this standard is to govern, we think the quality of the teller's act is for the triers of the facts." In *First Nat. Bank* v. *National Surety Co.,* 243 N. Y. 34, action on fidelity bond, the court held it was error to

take from the jury the issue of the cashier's "intent" (p. 40): "and that it was error to instruct the jury or leave them to believe * * * the purpose for which such overdraft was permitted could not be explained or excused."

Furthermore, the law conscious of the consequences to employees of filing claims under fidelity bonds and that a criminal or other wrongful intent is an indispensable element to be established on a proof of loss has uniformly held the employer is not duty-bound, in fact, is duty-bound to the employee not to give "notice of any acts which may constitute the basis for a loss" unless there is a criminal intent and until an employer has actual knowledge of such criminal intent.

American Surety Co. v. *Pauly,* 170 U. S. 133, 147:

"it may well be held that the surety company did not intend to require written notice of any act upon the part of the cashier that might involve loss, unless the bank had knowledge, not simply suspicion of the existence of such facts as would justify a careful and prudent man in charging another with fraud or dishonesty."

In *Hunt* v. *Fidelity & Deposit Co.,* 92 F. 2d 75, 77:

"* * * one must exercise great care and have positive evidence of embezzlement before he makes a formal charge and gives notice thereof."

United States Fidelity v. *Walker,* 248 F. 42, 43:

"provisions as to giving notice are not to be construed as to require action by the bank when it was not so far informed of the conduct of its cashier and of the intent accompanying that conduct as to be aware that he was guilty of what amounted to larceny or embezzlement." (Citing cases.)

Any claim of merit for the instant petition is completely negatived by *DeRonde* v. *Gaytime Shops, Inc.,* 239 F. 2d 735 (C.A. 2 Cir.) (Dec. 7, 1956), where the court (Medina, Lumbard and Waterman, C. JJ.) unanimously affirmed a jury's verdict on a trial before Judge Leibell.

In the *DeRonde* case, plaintiff sued for libel on a statement in a proof of claim identical with the instant libel, that plaintiff had "misappropriated" funds with the "intent to fraudulently deprive" defendant, his employer, of these funds. Plaintiff had stopped payment on his personal check cashed by defendant after a dispute on a claim for reimbursement of expenses asserted by plaintiff against defendant. The court stated p. 738:

> "The charge contained in the proof of loss embraced the crime of embezzlement, and under the law of Pennsylvania, where the act occurred, embezzlement requires a criminal intent. *Commonwealth* v. *Irvine,* 125 Pa. Super. Ct. 606 (1937). The existence or non-existence of such a criminal intent was, in this case, a question of fact for the jury."

The criminal intent, the existence or non-existence of which was held to be a question of fact for the jury was, of course, identical to the intent in the instant case—fraudulent misappropriation. In its main and reply briefs, Columbia contended to establish the defense of truth to a charge of fraudulent misappropriation, proof of fraudulent or criminal intent was not required. After the *DeRonde* decision was handed down, Columbia submitted to the Court of Appeals a lengthy memorandum which in essence repudiated this position and attempted to distinguish the *DeRonde* case from the case at bar on the ground that on a charge of larceny proof of felonious intent was required in Pennsylvania but not in the State of New York. The Court of Appeals rejected this contention and held Columbia, having specifically charged an intent to defraud, has to prove this intent to defraud, the existence of which was a question of fact for the jury. This proof of existence was required whether the libel was considered to be a charge of larceny under Section 1290 of the New York Penal Law, which requires specifically the existence of an "intent to defraud", and which intent is not eliminated by Section 1306 or whether not deemed to be a charge of larceny since the libelous mat-

ter specifically imputed this "fraudulent intent" to plaintiff. Similarly, this learned Court in the *Morissette* case, *supra,* in substantiation of the universal rule requires proof of a felonious intent which is a question of fact for the jury to sustain a charge imputing a criminal intent, especially applicable to Pennsylvania and New York, cited, among numerous decisions from various jurisdictions, *Thomas* v. *Kessler,* 334 Pa. 7, *People* v. *Will,* 289 N. Y. 413 and *Van Vechten* v. *American Eagle Fire Ins. Co.,* 239 N. Y. 303 (an action on an indemnity bond where the court stated certain acts "would not constitute a larceny, since there was lacking the felonious intent to appropriate another's property permanently and wholly.")

Any claim of appellant to the contrary, Judge Murphy and the Court of Appeals imposed upon defendant the precise burden defendant knowingly and voluntarily assumed when it filed, as found by the jury, with actual malice, personal ill-will to and in complete reckless disregard of plaintiff's rights a sworn statement to become a permanent part of the files of a bonding company containing the libelous *per se* charge that he, an employee, had misappropriated funds with the intent to fraudulently deprive defendant, his employer, of such funds. The court merely required defendant to establish the truth of the charge that plaintiff misappropriated funds with such fraudulent intent.

The concluding language of this learned Court in the *Morissette* case, *supra,* is specifically appropriate:

> "Had the jury convicted on proper instructions it would be the end of the matter. * * * They might have refused to brand Morissette as a thief. Had they done so, that too would have been the end of the matter. Reversed."

Appellant's argument that the instant case would make the value of fidelity bonds illusory is baseless. A claimant on a bond is completely protected provided he does not

knowingly file a fraudulent claim or even if the claim is false does not do it with actual malice. Appellant is actually urging this learned Court to hold contrary to the most fundamental principles of the law of defamation that claims filed under fidelity bonds are absolutely, unqualifiedly and unconditionally privileged. Such a decision would be tantamount to holding that a claimant merely by the payment of a premium could with complete impunity permanently ruin the reputation of his employee in order to collect a fraudulent claim knowing it to be fraudulent or file such a false claim with personal ill-will against an employee.

The complete answer to appellant's position is *Andrews* v. *Gardiner,* 224 N. Y. 440, where the court following the time honored rule of law that absolute privilege is confined exclusively to judicial proceedings and then only as to matters that are relevant refused to hold that slanderous statements made at a hearing for parole before the Governor were unconditionally privileged stating (p. 448):

> "While a convict and counsel act in good faith, they are immune; the privilege is lost when they defame with malice. There is no license, under cover of such an occasion, to publish charges known to be false or put forward for revenge."

The employer is protected provided he does not act with malice—fraudulently or in bad faith—and the burden or proving such malice is on plaintiff. The jury, in the case at bar, found that appellant filed false charges known to it to be false to collect on claims not covered by the bond and were filed with personal ill-will and actual malice toward plaintiff.

Similarly, appellant is completely in error when it asserts that had this action been instituted in the courts of the State of New York, it could have appealed to the New York Court of Appeals as a matter of right. Under

the New York Civil Practice Act, Sections 588 and 589, where a judgment for damages is unanimously affirmed by the Appellate Division, appellant may not appeal to the Court of Appeals as a matter of right but is required to obtain leave from the Court of Appeals to appeal which is granted only upon a showing that question of law is involved which ought to be reviewed.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent.

DAVID SCHENKER,
of Counsel.

APR 23 1957
JOHN T. FEY, C

Supreme Court of the United States

October Term 1956

No. 856

COLUMBIA PICTURES CORPORATION,

Petitioner,

against

RICHARD STEPHENS,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Respondent's brief in opposition is not responsive to the claim of error urged in the petition herein. The claim of error is that the Court of Appeals erred in refusing to construe the words "fraudulent intent" in accordance with the meaning of criminal intent as defined in the New York Penal Law. Respondent's disagreement with petitioner as to the meaning of the New York criminal statute and the decisions thereunder does not alter the fact that the Court of Appeals refused even to consider those New York authorities.

Moreover, even as to the meaning of the New York statute, respondent has summarized petitioner's contentions incorrectly. Respondent characterizes petitioner's claim as being that the New York statute eliminates the intent requirement entirely. This is not correct. Petitioner's contention is only that we must look to the New York statute and the decisions thereunder to determine what the elements of fraudulent or criminal intent are, and that, when we do so, we discover that respondent's admitted intent contained those elements. The issue of law before

the Court of Appeals was not *whether* fraudulent intent must be proved; the issue was *what* the elements of fraudulent intent as defined by the New York courts consist of. Accordingly, respondent's extensive citation (pp. 16-22) of cases for the general proposition that there can be no crime without intent misses the mark entirely.

As demonstrated by the state court decisions cited in the petition (pp. 11-14), intent to enforce a general claim of offset does not under New York law excuse misappropriation of property. On the contrary, such a purpose in and of itself constitutes criminal intent. See, e.g., *Greene* v. *Fankhauser* (1st Dept. 1910) 137 App. Div. 124, 132. In the present case, respondent expressly acknowledged that he misappropriated the monies given him on the expense voucher with the intention of enforcing his general claim of offset against Columbia for personal expenses (App'ee's App. 13-14, 16, 20-21, 39; App'nt's App. 47). Under the New York decisions cited in the petition (pp. 11-14), this was enough to constitute criminal intent. Accordingly, respondent by his own testimony was possessed of an intent which is regarded as criminal by New York law, and there was no issue of fact for the jury.*

Respondent's brief seeks to create the impression that an issue of fact existed as to whether there was an "understanding" by which Columbia consented to the withholding of the monies. The statement in respondent's brief to this effect (p. 4) is unsupported by any record reference and constitutes a bare-faced misrepresentation of the record.

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* Respondent suggests that the issue of intent may never be taken from the jury. This is true only in criminal cases because of the accused's constitutional right not to have a verdict directed against him with respect to any element of the crime. In civil cases, however, the issue of intent may, like any other issue, be taken from the jury under appropriate circumstances. *Buckeye Cotton Oil Co.* v. *Sloane* (6th Cir. 1921), 272 Fed. 615, 623; *Graves* v. *Kaltenbach & Stephens, Inc.* (1st Dept. 1923), 205 App. Div. 110, aff'd on other grounds 237 N. Y. 546.

There was no testimony whatsoever as to any "understanding", and this is borne out by the fact that no reference to any such testimony was made by either the District Judge or the Court of Appeals. On the contrary, both courts treated respondent's wrongful misappropriation of the monies without Columbia's consent as an undisputed fact, and the District Judge so charged the jury (App'nt's App. 109). The case was submitted to the jury only because of the District Court's misapprehension as to the legal significance of respondent's general claim of offset. There was never any suggestion that Columbia had authorized respondent's conduct!

Respondent's "Brief Outline of the Case" and statement of "Facts" contain a number of other misstatements. However, it would be inappropriate at this stage of the proceedings to belabor this Court with a detailed argument concerning the content of the record, especially since respondent's other misstatements do not affect petitioner's claim of error, which, as already stated, is that the Court of Appeals erred in refusing to determine whether respondent's admitted intent was criminal under the New York decisions.

An examination of the cases cited at pp. 19-21 of respondent's brief reveals that they support the contention made in the petition herein that New York recognizes no distinction between fraudulent intent as used in fidelity insurance and criminal intent as defined by the Penal Law. Indeed, respondent himself treats the terms fraudulent intent and criminal intent as interchangeable throughout his brief. Examination of the Court of Appeals' opinion, however, will reveal that it was based upon an attempt to distinguish between those two concepts (140 F. 2d, at pp. 766-767). Clearly, that decision was erroneous, and not even respondent has attempted to sustain the decision on the ground on which it was rendered.

Contrary to respondent's contentions, the action of the Court of Appeals in the instant case presents an appro-

priate subject for review by this Court. The refusal of the Court of Appeals to decide this type of case in accordance with expressed State policy is inconsistent with the firmly established principles often reiterated by this Court governing the role of the Federal judiciary in relation to the States. Indeed, as shown by the statistics set forth in the petition (p. 11), the issue is presented particularly acutely in the present case by reason of the large volume of fidelity insurance outstanding in the State of New York and the very definite policy pronouncements relating thereto which have been made by the New York courts.

Respondent repeatedly adverts to the fact that no formal exception was made to the charge to the jury. The questions now presented, however, were adequately preserved by the motions for a directed verdict and a new trial (App'nt's App. 93, 114), for, apart from its failure to apply New York law in determining whether the issue of fraudulent intent should be submitted to the jury, the District Court recognized that the defense of truth had been established as a matter of law (App'nt's App. 109).

Respondent's brief (p. 2) states that no motion was made to the Court of Appeals for a stay. Respondent neglects to mention that a stay pending final disposition of the case in this Court has been obtained from the District Judge who presided at the trial.

Respectfully submitted,

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